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December 29, 2021

Via CM/ECF

Honorable John Koeltl
U.S. District Court Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: *Cody Pepper, et al. v. Fluent, Inc. and Reward Zone USA, LLC*,
Case No. 1:21-cv-06581-JGK

Dear Judge Koeltl:

As counsel for the Defendants, Fluent, Inc. and Reward Zone USA, LLC in the referenced matter, I write to request a pre-motion conference for the Defendants' anticipated Motion to Dismiss the First Amended Complaint ("1AC").

This case involves six plaintiffs who allege individual and putative class claims for supposed violations of the Telephone Consumer Protection Act ("TCPA"). They assert claims based on provisions of the TCPA, that statute's implementing regulations, and certain state laws. Their claims purport to arise from 30 text messages.

The Plaintiffs filed their 1AC while the Motion to Dismiss remained pending. The Court now has two options: (1) deny the Motion to Dismiss as moot or (2) evaluate the Motion to Dismiss against the facts in the 1AC. *Pettaway v. Nat'l Recovery Sols., LLC*, 955 F.3d 299, 303 (2d Cir. 2020). The forthcoming Defendants' Reply Memorandum lays out the same options. For completeness, the Defendants submit this pre-motion letter. But we note that the Court can exercise its discretion to consider the pending Motion to Dismiss.

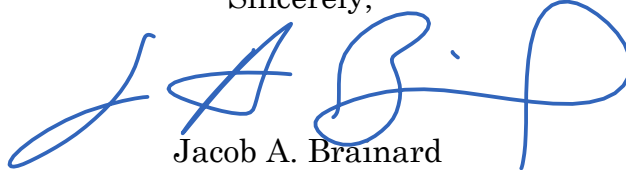
While the 1AC adds more detail to the Plaintiffs' picture, the pleading still suffers from most of the same flaws as its original counterpart. The 1AC did eliminate some state law claims and claims relating to text messages as a prerecorded voice. But otherwise, the substance of the TCPA claims has not changed. In lieu of reiterating the argument summary from the first pre-motion letter, a copy of that October 21st letter is included for reference. The Court stayed discovery pending the outcome of the Motion to Dismiss, and the Defendants see no reason to alter that stay.

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With the similarities in weakness between the original complaint and the 1AC, the Court may deem another telephone conference unnecessary. With or without a conference, the Defendants request this Court approve the filing of a Motion to Dismiss the First Amended Complaint and set a briefing schedule. Balancing presently pending deadlines in other cases, the Defendants suggest a deadline of either January 28th or February 4th to file the initial moving papers.

Please let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read 'JABP', is written over the printed name Jacob A. Brainard.

Jacob A. Brainard

Enclosure